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Supreme Court of the United States

OCTOBER TERM, 1943

No. 828

322US#19
PHI-POL

GEORGE PHILLIPS,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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GEORGE PHILLIPS,
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RESPONDENT'S BRIEF

Opinion Below

The petitioner was convicted of the crime of ROBBERY in the first degree (Penal Law, §§ 2120, 2124), in the Court of General Sessions of New York County, State of New York (Minutes of Sentence, pp. 7, 12-3).

On appeal to the Appellate Division of the Supreme Court of the State of New York, First Department, that Court unanimously affirmed the judgment of conviction, without opinion, in a memorandum, reported *sub nom* in 266 App. Div. 830. On further appeal to the Court of Appeals, the judgment of conviction was affirmed, without opinion, RIPPEY, J., dissenting, in a memorandum; the affirmance is reported in 292 N. Y. 506.

Jurisdiction

The jurisdiction of this Court is apparently invoked under section 237 (b) of the Judicial Code as amended [28 U. S. C. A., § 344 (b)] upon the claim that the peti-

tioner was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Question Presented

At the trial of the petitioner and William Bird—jointly tried as codefendants for the same armed robbery—witnesses testified as to admissions of guilt, implicating the petitioner, made by Bird after his arrest.

The petitioner claims that Bird's admissions were the result of coercion and duress and urges further that the receipt in evidence of the testimony as to Bird's admissions effected a denial to petitioner of due process of law.

I

The testimony as to inculpatory admissions, voluntarily made immediately after his arrest by the petitioner's codefendant, was properly received at their joint trial; there was neither error in law nor denial of due process in the admission of this testimony [In answer to the Petition, pp. 2-8].

The petitioner and his codefendant, William Bird, were jointly tried and convicted for the armed robbery of the Hotel Earle in New York City which took place on July 31, 1941, when four men held up the manager and night clerk and fled with the contents of the safe and cash drawer (Kolar: 7-13; Hever: 36-41).* At the trial both of the victims positively identified the petitioner and Bird as the robbers (Kolar: 10; Hever: 38-9). Before the trial, one of these witnesses had picked out the petitioner in a line up, and the other witness had identified

* References, unless otherwise indicated, are to pages in the Stenographer's Minutes of the trial.

him at the same time in a different manner (Hever: 41-3; Kolar: 13-4, 20, 34, 96).

In addition to this testimony identifying the petitioner and his codefendant as the robbers, three police officers testified that Bird, when arrested, admitted that he and three others, including the petitioner, had committed the robbery (O'Brien: 57, 61; Stepat: 63-4, 65-6, 77-8; Broderick: 81-2, 89).[1]

The petitioner urges that the trial court erred in admitting the testimony as to Bird's admissions (Petition, pp. 2-6). Further, he contends that Bird made these admissions involuntarily, as a result of undue delay in arraignment, and that they were "illegally obtained" (Petition, pp. 3-8). On the basis of these assertions, and on the further incomprehensible ground that he was denied a right of confrontation and cross-examination because of the "hearsay" nature of Bird's admissions, the petitioner contends that he was denied due process of law (Petition, p. 5).

There is basis neither in fact nor in law for the petitioner's claim. Bird's admissions were not coerced or the result of delay in his arraignment. He was arrested about 9:30 p. m. on August 22, 1941 (O'Brien: 54; Stepat: 79). He was at once taken to the police station where, in response to questions by Detective Stepat, he admitted almost immediately that he was "in on the Earle job" and that the petitioner and others were also participants in the crime (O'Brien: 57, 61; Stepat: 63-4, 65-6, 77-8; Broderick: 81-2, 89). Indeed, so readily did Bird tell of the crime that within two hours of his arrest, acting on information given by him, the officers were able to effect the arrest of the petitioner in a distant part of the city (O'Brien: 58).

At the regular police lineup the next morning, August 23, 1941—before a general assemblage of detectives and

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1. Neither the petitioner nor Bird took the stand, seemingly on the advice of counsel (1). Each of the codefendants had his own trial counsel (1).

officials—Bird again acknowledged his guilt and implicated the petitioner, as was proved by a stenographic transcript of his admissions (Driscoll: 90-2).

Clearly, therefore, Bird's admissions were not forced by any inquisitorial questioning or prolonged detention. And the petitioner's emphasis on the fact that Bird was not arraigned until two days after he admitted his and the petitioner's guilt has no significance (Petition, pp. 4, 7). No evidence adduced at the trial resulted from the delay in arraignment; the testimony was confined solely to what Bird admitted immediately after his arrest and repeated a few hours later in the semi-public police lineup. Bird's arraignment was delayed for reasons unconnected with the crime for which he and the petitioner were tried.[2]

Nor is there the slightest basis for the petitioner's intimation that Bird's admissions were the result of force or duress (Petition, p. 3). On the contrary, the record shows that Bird suffered no mistreatment whatever, that he willingly told of the crime when caught, and that he cooperated with the police to apprehend the petitioner (61, 62, 67, 68, 76, 77, 78, 85, 89, 93, 95; see, also, *re* Dr. Torre, 102). As the trial court said, there was "not a scintilla of evidence" to indicate that Bird's admissions were obtained by duress or coercion (Minutes of summations and charge, p. 50).

The petitioner's reliance (Petition, pp. 7-8) on this Court's condemnation of convictions resting on confessions extorted by coercion or duress [*Chambers* v. *Florida* (1940) 309 U. S. 227; *Brown* v. *Mississippi* (1936) 297 U. S. 278], is, of course, misplaced. No confession by the petitioner is here involved. As the petitioner himself

2. The record indicates that during the interval between his arrest and arraignment Bird was informing the police of other crimes which he and his gang had committed; the police, acting on this information, were conducting an investigation, unrelated to the crime of which the petitioner was convicted (56, 57, 77, 91).

states: "he made no admissions or confession" (Petition, p. 4). Consequently, the cases cited by him are inapplicable on the facts. And the principles set forth in the cited cases are not relevant to the instant case, even if extended so as to relate to Bird's admissions, since they—as has been shown—were not the product of coercion or duress.

Other cases cited by the petitioner in which this Court, formulating "proper standards for the enforcement of the federal criminal law in the federal courts," reversed convictions where confessions were obtained through delay in arraignment, are likewise inapplicable here. [*McNabb* v. *United States* (1943) 318 U. S. 332, 341; see, also, *Anderson* v. *United States* (1943) 318 U. S. 350.] Whatever delay in arraignment there was here had no connection with the admissions made by Bird.

The petitioner's contention that he was denied constitutional rights by the admission in evidence of testimony as to Bird's confessions—irrespective of the voluntariness thereof—is without substance (Petition, pp. 5-6). There was no denial of the right of cross-examination, as petitioner asserts (Petition, p. 5). In truth, the petitioner's trial counsel had full opportunity to cross-examine each witness, and did so (17, 35, 44, 60, 68, 79, 87, 93). Further and beyond that, the trial court went to extremes to safeguard the petitioner from any prejudice. Thus, the jury was repeatedly instructed to limit Bird's admissions to Bird's own guilt (58, 64, 81; Minutes of November 17, 1941, p. 49). Subject to such instructions, the admissions were properly received in evidence under settled New York law. [See *People* v. *Fisher* (1928) 249 N. Y. 419, 425-426.] But even if it be assumed—in disregard of the contrary determinations of the appellate courts of New York—that the trial court committed error in ruling on the admission of the testimony, there is no federal question raised. Error, without more, is not enough. This court does "not sit to review state court action

on questions of the propriety of the trial judge's action in the admission of evidence." [See *Lisenba* v. *California* (1941) 314 U. S. 219, 228; see, also, *Buchalter* v. *New York* (1943) 319 U. S. 427, 430.] And "tested by an appraisal of the totality of facts" [See *Betts* v. *Brady* (1942) 316 U. S. 455, 462], there is nothing in the instant case to indicate such "failure to observe that fundamental fairness essential to the very concept of justice" as constitutes a denial of due process. [*Lisenba* v. *California*, *supra*, 314 U. S. 219, 236.]

II

No federal question is presented.

Examination of the petitioner's claims, on the merits, has revealed absolute lack of substance. Consideration of the case on purely procedural grounds shows no federal question is presented to this Court. Nothing in the record of the trial, or in the decisions of the courts of New York, indicates that a constitutional or federal question was raised or passed upon. Under these circumstances, this Court will not assume jurisdiction. [See *Herndon* v. *Georgia* (1935) 295 U. S. 441; *Lynch* v. *New York* ex rel. *Pierson* (1934) 293 U. S. 52, 54-55.]

III

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated, April, 1944